

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 14, 2009 Session

JERRY and CINDY WILSON, Grandparents of K.W., v. APRIL GLADDEN

**Direct Appeal from the Chancery Court for Hamilton County
No. 08-0320 Hon. W. Frank Brown, III., Chancellor, Part 1**

No. E2008-02283-COA-R3-CV - FILED JULY 22, 2009

Plaintiffs, paternal grandparents, filed this action pursuant to the Grandparents Visitation Act, to obtain court ordered visitation with their grandchild, since the child's father was deceased. Following an evidentiary hearing, the Trial Court ordered visitation and the mother appealed. We affirm the Judgment of the Trial Court.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and JOHN W. MCCLARTY, J., joined.

Linda B. Hall, Soddy Daisy, Tennessee, for appellant, April Gladden.

Michael A. Anderson, Chattanooga, Tennessee, for appellees, Jerry and Cindy Wilson.

OPINION

This is an action by the paternal grandparents against the mother of their grandchild, seeking grandparents' visitation rights to their deceased son's only child. They charged that the mother was cooperative at times, and uncooperative at other times.

The mother answered and denied she was uncooperative with their requests for visitation, and in a Counter-Complaint averred that plaintiffs converted or took control of personal and real property that rightfully belonged to her daughter as her father's sole heir.

The Trial Court conducted a trial on July 9, 2008, and Cindy Wilson the paternal grandmother testified that she and her husband enjoyed shared visitation with their grandchild as long as the father lived, and formed a close bond with her grandchild. She testified that the grandchild had a fully furnished room at her house and a closet full of clothes, and that they frequently took her to events.

She testified that she and her husband had significant visitation with the grandchild from September 2007 to March 2008, but that it had substantially decreased. She testified the mother had not allowed them to have any overnight visitation since March, and that they decided to file a petition to establish visitation because the mother had restricted their time so much.

She testified that the mother had refused to allow them to contact her on the telephone, and that since filing the petition she had been forced to go through the maternal grandmother to schedule any time with the grandchild. The mother testified that she felt the Wilsons should have visitation, but that it was very stressful dealing with the grandmother, and the mother agreed that a set schedule would probably be less stressful.

After all the evidence was presented, the Trial Court made findings from the bench and found the parties needed counseling to help them “walk” the child through dealing with the death of her father, and that a counselor would be beneficial in helping the mother and the grandparents improve their relationship and communication. The Court entered an Order and found the plaintiffs had sustained their burden of proof and that the mother desired to have a regular visitation schedule for the plaintiffs and the grandchild, and that such was in the grandchild’s best interests. The Court further found that it did not have jurisdiction to grant any relief on the Counter-Complaint, and that would need to be adjudicated in Georgia where the probate estate was pending.

The mother then filed a Motion to Stay the Trial Court’s Judgment, asserting that the grandparents should not have been granted any relief because they did not show the mother opposed visitation. The Court made further findings that the mother basically requested the Court to set a visitation schedule, and the Court then specifically found the mother did effectively oppose visitation by the grandparents, because she quit taking their calls, and left it to her mother to work out any visitation. The Court found that no visitation was offered by the mother or the maternal grandmother, and that the “paucity” of visitation allowed amounted to a denial of visitation.

The mother appealed and raises these issues:

1. Did the Court err in entering an order setting specific grandparent visitation when there was no opposition to the visitation by appellant?
2. Did the Court err in entering an order setting specific grandparent visitation when there was no proof or finding of substantial harm to the child?
3. Did the Court abuse its discretion in ordering appellant to attend joint

counseling with the Wilsons and requiring her to pay up to one-half of the cost of the counseling?

On appeal, the mother argues that this case should not have been adjudicated pursuant to Tenn. Code Ann. §36-6-306, because the statute requires the custodial parent's opposition¹ to visitation, and she argues that she did not actually oppose visitation by the grandparents. She admitted, however, that she had significantly reduced the grandparents' time with the grandchild in the few months preceding the trial.

Tenn. Code Ann. §36-6-306, the Grandparent Visitation Act, states that certain circumstances (such as the death of a parent) will necessitate a hearing regarding grandparent visitation "if such grandparent visitation is opposed by the custodial parent". In a recent case decided by this Court, this phrase was construed to mean "situations both where visitation is denied totally and where visitation is technically not opposed, but where the frequency and/or conditions imposed by the parents on the visitation are such that it equates to a denial of visitation." *Huls v. Alford*, 2008 WL 4682219 (Tenn. Ct. App. Oct. 22, 2008). This Court in that case held the trial court erred by awarding grandparent visitation without a specific finding that the parents opposed visitation by the grandparents. *Id.*

The distinguishing factor in the case before us is that the Trial Court here found the mother did oppose visitation by the grandparents and severely limited visitation and refused to take their calls. Moreover, the mother "wanted" the Court to set a visitation schedule, and recommended what she felt to be reasonable. We equate substantial limitation on visitation and refusing to take calls to establish visitation is tantamount to opposing visitation, which the Trial Court found. The evidence does not preponderate against his decision. Tenn. R. App. P. 13(d).

The mother by suggesting or imploring the Court to set a visitation schedule waived the issue she raises on the appeal to visitation and will not be heard to complain about what she essentially agreed to. *See* Tenn. R. App. P. Rule 36(a). We affirm the Trial Court on this issue and conclude the other issues raised on appeal are without merit.

We affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to April Gladden.

HERSCHEL PICKENS FRANKS, P.J.

¹ Opposed is commonly defined as "to argue against" or "resistant to".